

The chapter and verse which has been directed to this court to hold for the plaintiff makes it only too obvious that there is a sense of outrage that the insurers here are insisting upon an amputation when, on any view of the medical reports, no benefit will accrue to the defendants by insisting on having the plaintiff's arm amputated. It has been left to be implied that the cost of the operation may outweigh the amount payable under the policy so as to make it uneconomical for the plaintiff to go through with the exercise even if he were minded to do so. Indeed in his written submission, counsel for the plaintiff, has sought to draw parallels between the defendants' attitude, and Shylock's insistence upon the performance of his bond in *The Merchant of Venice*. But the defendant is an insurance company with a duty to its shareholders. A company is entitled to expect its officers to carry out their duties in accordance with the tenor of their obligations.

Mr. Param Kumaraswamy, counsel for the defendants has submitted that the language of the policy, particularly that under the heading 'Basic Accidental Dismemberment Benefit', is clear and unambiguous. Indeed the very purpose of providing for the meaning of loss of hands and feet is to see that there is no doubt or confusion as to the meaning of the risk covered. He says that it is the failure to provide such definitions which caused controversies in the American cases cited by plaintiff's counsel.

With these views I entirely agree. The words have been put there to obviate the necessity for making fine judgments whether a limb has or has not been lost. As Milton says, "they also serve, who only stand and wait." Here there was a prognosis for amputation in 1981 but in terms of percentage disability the plaintiff's medical adviser assessed 75% for the left upper limb. Taking the dimmest view of this, even the plaintiff must concede that the limp arm serves a cosmetic purpose. He simply cannot say that he has lost it because it is still there for the whole world to see.

The claim is dismissed with costs.

Claimed dismissed.

Solicitors: *Wong & Dass; Shook, Lin & Bok.*

**A LIAN KEOW SDN. BHD. (IN LIQUIDATION)
& ANOR. v. OVERSEAS CREDIT FINANCE
(M) SDN. BHD. & ORS.**

[O.C.J. (Yusoff Mohamed J.) January 25, 1986]

[Johore Bahru – Civil Suit No. 100 of 1980]

B

Company Law – Transfers, charges and sales of land before and after commencement of winding up – Validity of transactions – Whether first defendant had knowledge of winding up – Validation order – Claim against company director – Companies Act, 1965, ss. 229 & 293 – Interpretation Act, 1967, s. 35(1).

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Bankruptcy Law – Transfers, charges and sales of land before and after commencement of winding up – Validity of transactions – Whether first defendant had knowledge of winding up – Validation order – Claims by liquidator – Bankruptcy Act, 1967, ss. 53 & 53B.

D

Land Law – Transfers, charges and sales of land before and after commencement of winding up – Validity of transactions – Whether should be set aside – Trust – Caveat – Whether first defendant had knowledge of winding up – Validation order – Factors for granting – National Land Code, 1965, ss. 206(1)(b) & 320(2).

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This case concerned three portions of a piece of rubber estate measuring a total of 893 acres owned by Lian Keow Sdn. Bhd. (the first plaintiff) located in the Mukim of Pulau, District of Johore Bahru. The first plaintiff, a local company, was wound up on March 11, 1979. The second plaintiff is the provisional liquidator of the affairs of the first plaintiff. The first defendant was and is a licensed finance company controlled by one Amos William Dawe of the Mosbert Group of Companies from December 1972 to October 1979. Mosbert Berhad was wound up in 1977. The second defendant, Sungei Perling Holdings Sdn. Bhd., was incorporated in Malaysia on May 9, 1979 and its directors were one Gwei Wang Kiat and his wife. The third defendant is Perusahaan Pelangi Sdn. Bhd. The fourth defendant is Chelliah Paramjothy, an advocate and solicitor. The fifth defendant is Yap Fui Chong, the main shareholder of the first plaintiff at the material times.

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In this suit the plaintiffs seek declarations that a series of transactions consisting of charges, transfers and sales of lands in the rubber estate belonging to the first plaintiff which were executed before and after the presentation on November 13, 1978, of the petition for winding up of the first plaintiff was null and void.

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The central figure in this case and frequently referred to by all the parties involved in these transactions is Dawe, who controlled the first plaintiff when the fifth plaintiff agreed to sell the whole of the share capital of the first plaintiff to Dawe on December 6, 1972. This brought the first plaintiff to troubled waters. On December 12, 1972, the fifth defendant (on the direction of Dawe) caused the first plaintiff to execute a charge of the first portion (503 acres) of the estate in favour of the first defendant to secure a loan of M\$2,500,000 with interest. This loan was paid by the first defendant to Syarikat Ng Kong Yeam. On February 27, 1973 the fifth defendant (on the direction of Dawe) caused the first plaintiff to execute a transfer of the

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second portion (87 acres) of the estate to the fourth defendant for \$174,000 although no money was in fact paid or intended to be paid. On March 17, 1973, the fifth defendant (on the direction of Dawe) caused the first plaintiff to execute a transfer of the third portion (303 acres) of the estate to one Wong Peng Fun, who executed a deed of trust. No money was paid or intended to be paid by Wong. On December 15, 1975 he executed a charge of the third portion in favour of the first defendant. On December 28, 1975, the fourth defendant executed a charge in favour of the first defendant. The first portion of land in Originating Summons No. 83 of 1975 was not sold in November 1976. On November 13, 1978 the Government of Malaysia presented a petition to wind up the first plaintiff on the ground that it was unable to pay its debts.

On November 21, 1978, the transfer of the first portion of the estate from the first plaintiff to the first defendant was presented and eventually registered. The transfer by the fourth defendant of the second portion to the first defendant on November 30, 1978 was registered; and the transfer of the third portion by Wong to the first defendant was also registered with effect from that date. By an agreement dated March 19, 1979, the first defendant agreed to sell the whole estate to Gwei for some M\$5 million. By an agreement dated July 6, 1979 made between Gwei and one Low Eng Heng (acting on behalf of the third defendant), Gwei agreed to sell to Low or his nominee the whole of the estate for some M\$10 million. Eventually on October 30, 1979 (after removal of a caveat filed by one Choh Yet) the second defendant was registered as proprietor of the whole of the estate. The second defendant then sold the whole estate to the third defendant and the full purchase money had been paid or retained when the agreement was completed on November 29, 1979. On April 12, 1980, the Official Receiver as liquidator commenced these proceedings by writ.

Held, dismissing all claims with costs against the first, second and fifth defendants: (1) the registered owners of the second and third portions of the estate held them upon trust for the first plaintiff at all material times before November 1978;

(2) the transfers of the first, second and third portions of the estate to the first defendant are (i) not void by reason of section 53 of the Bankruptcy Act 1967 and (ii) void for the purpose of section 223 of the Companies Act 1965 but now validated, there being no bad faith or dishonest intention proved against the first defendant. The first defendant is entitled to the validation order as it had no knowledge of the petition for winding up when it took the transfer in November 1978;

(3) section 53B of the Bankruptcy Act 1967 does not apply to the proceeds of sale. The second plaintiff is not entitled to recover from the first defendant the proceeds of the sale to the second defendant in March 1979, nor from the second defendant the proceeds of the sale to the third defendant in July 1979;

(4) it is not proved that equity ought to set aside the transfers of the first, second and third portions of the estate to the first defendant;

(5) there will be judgment for the plaintiffs as prayed against the fourth defendant and an order that damages against him be assessed with costs. Both costs to be taxed.

A [Editorial Note: This case has gone on appeal to the Supreme Court.]

Cases referred to:

- (1) *Frazer v. Walker* [1967] A.C. 569.
- (2) *Bachan Singh v. Mahinder Kaur & Ors.* [1956] M.L.J. 97.
- B (3) *Ong Chat Pang & Anor. v. Valliappa Chettiar* [1971] 1 M.L.J. 224.
- (4) *Gorringe v. Irwell India Rubber & Gutta Percha Works* (1886) 34 Ch. 128.
- (5) *Abigail v. Lapin* [1934] A.C. 491, 500.
- (6) *Pemungut Hasil Tanah Kota Tinggi v. U.M.B.C. Bhd. & Anor.* [1981] 2 M.L.J. 264.
- C (7) *U.M.B.C. Bhd. & Anor. v. Pemungut Hasil Tanah Kota Tinggi* [1984] 2 M.L.J. 87, 91.
- (8) *Tham Kok Leong v. Low Kim Hai* [1983] 1 M.L.J. 187.
- (9) *Royal British Bank v. Turquand* (1856) 6 E. & B. 327; 119 E.R. 886.
- (10) *Re David Payne & Co. Ltd.* [1904] 2 Ch. 608, 618.
- D (11) *Re Wallis & Simmonds (Builders) Ltd.* [1974] 1 All E.R. 561.
- (12) *Belmont Finance v. Williams Furniture (No. 2)* [1980] 1 All E.R. 393.
- (13) *Re Steane's (Bournemouth) Ltd.* [1950] 1 All E.R. 21, 25.
- E (14) *Re Leslie Engineers Co. Ltd.* [1976] 1 W.L.R. 292, 304.

CIVIL SUIT.

J.M. Chadwick, Q.C. (T. Thomas and Miss Kathleen Chew with him) for the plaintiffs.

F *D.K. Rattee, Q.C. (R.R. Sethu with him) for the first defendant.*

Ho Thian Cheh for the second defendant.

G *G.S. Nijar for the fourth defendant.*

U. Masacorale for the fifth defendant.

Cur. Adv. Vult.

H Yusoff Mohamed J. : The 1st plaintiff is a local company limited by shares and is in liquidation. Upon a petition of the Government of Malaysia presented on November 13, 1978, the plaintiff company was ordered to be wound-up under the provision of the Companies Act 1965. The Winding-Up Order was issued on March 11, 1979, and the Official Receiver, the 2nd plaintiff, was constituted provisional liquidator of its affairs.

I In this suit the plaintiffs seek declarations that a series of transactions consisting of charges, transfers and sales of lands in a rubber estate belonging

to the 1st plaintiff which were executed before and after the petition of the Winding Up Order were null and void. They also seek an order that the payments from the proceeds of such transactions be made to the 2nd plaintiff.

Central figure in this case and frequently referred to by all the parties involved in these transactions is one Amos William Dawe which name is not unfamiliar in this Court. In the 1970s he controlled a group of companies under his flagship known as Mosbert Berhad. In 1975 this Mosbert Group of Companies was in serious financial difficulties and in 1977 Mosbert Berhad was wound up.

The 1st plaintiff company entered troubled waters in 1972 when its main shareholder, the 5th defendant, agreed to sell all his 'shareholders' in Lian Keow Sdn. Bhd. to Dawe on December 6, 1972 (Exhibit J. 12). The assets of the company consisted of 893 acres of rubber estate in the Mukim of Pulau, District of Johore Bahru. For ease of reference in this proceeding the titles to these lands may be divided into three portions:

First portion:

State Leases numbered 2198 to 2241 for lot numbers 3320 to 3420 (both inclusive) 503 acres.

Second portion:

C.T. 14799 to 14815 for lot numbers 3302 to 3318 (both inclusive) 87 acres.

Third portion:

Grant 21955 for lot number 2679 for 303 acres.

At this stage it will be helpful to glean through the facts which have been fairly summarised by the counsel for the plaintiffs and which are not seriously disputed by all the counsel for the defence. These facts are necessarily long as the series of transactions took place over a period of 8 years — 1972 to 1980. They are:

- (a) The first plaintiff is a private limited company incorporated in Malaysia. Until December 1972 the first plaintiff was owned or controlled by the fifth defendant (Yap Fui Chong). By a memorandum in writing dated December 6, 1972 (reflecting an earlier oral agreement)

Yap agreed to sell the whole of the share capital of the plaintiff company to Amos William Dawe. From that time the plaintiff company was controlled by Dawe and was treated as a member of the Mosbert Group of Companies. Yap remained a director of the plaintiff company until October 1, 1976.

- (b) In December 1972 the plaintiff company was (and for some time had been) registered at the land office as the proprietor of a rubber estate (known as the Lian Keow estate) in the Mukim of Pulau, district of Johore Bahru, comprising an area of about 893 acres. The estate was (until December 1972) free from any legal charge or other encumbrance, and was shown as an asset in the balance sheet of the plaintiff company with a value of M\$3,600,000.

- (c) On or about December 23, 1972 Yap (at the direction of Dawe) caused the plaintiff company to execute an instrument of charge in Form 16A prescribed by the National Land Code in respect of some 503 acres of the estate ("the first portion") known as lots 3320 to 3420 (both inclusive) and held under Estate Leases numbered 2198 to 2241, 2242 and 2243 to 2298. The charge was expressed to be made for the purpose of securing repayment to the first defendant, Overseas Credit Finance (M) Bhd. (described as "the chargee") of a loan of M\$2,500,000 with interest thereon at the rate of 12 per cent per annum.

- (d) The first defendant (OCF) was, and is, a licensed finance company within the meaning of the Finance Companies Act 1969. In December 1972, and at all times thereafter until October 1979, OCF was controlled by Dawe.

- (e) The same solicitor, Syarikat Ng Kong Yeam, acted both for the plaintiff company and for the first defendant OCF in connection with the charge over the first portion of the estate. The sum of M\$2,500,000 was paid by OCF to Ng Kong Yeam in three amounts on December 7 & 9, 1972; but whether Ng Kong Yeam received those payment as solicitor for the plaintiff company or as solicitor for OCF is in dispute. Ng Kong Yeam retained one of the payments made to him (M\$25,000) on account of his costs. The other two payments (M\$1,450,000 on December 7, 1972 and M\$1,025,000 on December 9, 1972) were paid by Ng Kong Yeam to Pan Orient Enterprises

- Sdn. Bhd., another company in the Mosbert Group. Pan Orient used the first of those payments (M\$1,450,000) to repay monies owing by it to OCF; and this repayment, made on December 9, 1972, was the source from which OCF was enabled to fund the second payment (M\$1,025,000) made to Ng Kong Yeom on that day.
- (f) On or about February 27, 1973 Yap (on the direction of Dawe) caused the plaintiff company to execute a transfer in Form 14A prescribed by the National Land Code in respect of a further 87 acres of the estate ("the second portion") known as lots 3302 to 3318 (both inclusive) and held under titles CT 14799 to 14815. The transfer was into the name of the fourth defendant, Chelliah Paramjothy and was expressed to be in consideration of M\$174,000. In fact no money was paid (or was ever intended to be paid) by Paramjothy to the plaintiff company as consideration for that transfer. The fourth defendant was registered at the land office as proprietor of the second portion on or about April 7, 1973.
- (g) On or about March 17, 1973 Yap (at the direction of Dawe) caused the plaintiff company to execute a transfer in Form 14A in respect of a further 303 acres of the estate ("the third portion") known as lot 2679 and held under Grant 21955. The transfer was into the name of one Wong Peng Fun, and was expressed to be in consideration of M\$545,400. In fact no money was paid (or was ever intended to be paid) by P.F. Wong to the plaintiff company as consideration for that transfer. On the same day P.F. Wong executed a deed of trust (to which Paramjothy was witness) in which he declared that he held the third portion of the estate in trust for the plaintiff company. P.F. Wong was registered at the land office as proprietor of the third portion on or about June 16, 1973.
- (h) On September 11, 1975 OCF issued an originating summons in the High Court of Malaya at Johore Bahru (No. 83 of 1975) pursuant to section 256 of the National Land Code seeking an order for the sale by public auction of the first portion of the estate. In an affidavit sworn by Kay Chek Lit (as a director of OCF) on August 22, 1975 in support of that summons it was alleged that the amount of the loan with accumulated interest down to December 31, 1974 was M\$2,922,343.41. The solicitors acting for OCF in connection with proceedings No. 83 of 1975 were Messrs. Wong & Paramjothy, of which the fourth defendant was the sole principal.
- (i) By December 1975 the Mosbert Group of Companies was in serious financial difficulty.
- (j) On December 15, 1975 P.F. Wong executed a charge in Form 16A in respect of the third portion of the estate. The charge was expressed to be for the purpose of further securing to OCF (as chargee) repayment by the plaintiff company of the sum of M\$2,500,000 with interest under the charge dated December 23, 1972. The charge was prepared by Wong & Paramjothy on the instruction of OCF; and the costs in connection with the charge were paid by OCF.
- (k) On December 28, 1975 the fourth defendant (Paramjothy) executed a charge in Form 16A in respect of the second portion of the estate. Again, the charge was expressed to be for the purpose of securing to OCF repayment by the plaintiff company of the sum of M\$2,500,000 with interest due under the charge dated December 23, 1972; and, again, the charge was prepared by Wong & Paramjothy on the instruction of OCF and the costs in connection with the charge were paid by OCF.
- (l) On April 13, 1976 an order was made in the proceedings No. 83 of 1975 that the first portion of the estate be sold by public auction under the direction of the court for the recovery of the sum of M\$3,453,258.52 being principal and interest as at April 13, 1976 due under the charge dated December 23, 1972. The amount of the indebtedness recited in the order is taken from paragraph 2 of an affidavit made by the fourth defendant (as solicitor for OCF in those proceedings) on April 5, 1976. On October 20, 1976 a further order was made in those proceedings for the auction to be held on November 29, 1976 and for the reserve price to be fixed by the Senior Assistant Registrar.
- (m) Notwithstanding the orders made in the proceedings No. 83 of 1975 the first portion of the estate was not sold by public auction (or at all) in November 1976. On February 25, 1977 the first defendant, OCF, gave notice, pursuant to section 272 of the National Land Code in

Form 16K of its entry into possession of the first portion. A

was constituted provisional liquidator of its affairs.

- (n) On March 16, 1977 the Government of Malaysia obtained judgment against the plaintiff company in the High Court of Malaya at Johore Bahru (Civil Suit No. 63 of 1977) in the sum of M\$221,386.93 together with interest at 6 per cent per annum and costs. On May 25, 1977 the Government gave notice to the plaintiff company that the judgment remained unsatisfied and that action would be taken against the company without further warning. On December 14, 1977 the Government made further demand to the plaintiff company for payment of its debt by serving notice pursuant to section 218 (2) (a) of the Companies Act 1965. On November 13, 1978 the Government presented a petition to the High Court of Malaya at Johore Bahru for the winding up of the plaintiff company under the provisions of that Act on the ground that it was unable to pay its debts. B
- (o) On November 21, 1978 transfer of the first portion of the estate from the plaintiff company to the first defendant, OCF, was presented to the Land Office for registration; and in due course was registered with effect from that date. The transfer itself was dated November 4, 1978. C
- (p) On November 30, 1978 a transfer of the second portion of the estate to OCF was presented to the Land Office for registration; and in due course was registered with effect from that date. The transfer, which was executed by the fourth defendant, Paramjothy, is undated but it is not in dispute that it was probably executed in September 1978. D
- (q) Also on November 30, 1978 a transfer of the third portion of the estate to OCF was presented to the Land Office for registration; and in due course that transfer was registered with effect from that date. The transfer, which purports to have been executed by P.F.Wong (although the fact of execution by P.F.Wong is not admitted by the plaintiff) is dated September 23, 1978. E
- (r) On March 11, 1979, upon the petition of the Government of Malaysia presented on November 13, 1978, the plaintiff company was ordered to be wound up under the provisions of the Companies Act 1965 and the Official Receiver was constituted provisional liquidator of its affairs. F
- (s) By an agreement dated March 19, 1979 and made between the first defendant OCF and one Gwei Way Kiat, OCF agreed to sell to Gwei for the price of M\$5,152,000 the whole of the first, second and third portions of the estate. The deposit payable on execution of that agreement was 1 per cent of the purchase price (i.e. M\$51,520). The agreement provided that on completion OCF should lend to Gwei or his nominees 90 per cent of the purchase price (i.e. M\$4,636,800) at a rate of interest of 10 per cent per annum to be secured on the property. G
- (t) The second defendant, Sungei Perling Holdings Sdn. Bhd. was incorporated in Malaysia on May 9, 1979. The directors of that company were Gwei and his wife. H
- (u) By an agreement dated July 6, 1979 made between Gwei and one Low Eng Heng (acting on behalf of the third defendant Perusahaan Pelangi Sdn. Bhd.) Gwei agreed to sell to Low or his nominee for a price of M\$9,977,903.13 the property (being the first, second and third portions of the estate) which he had purchased from OCF under the agreement dated March 19, 1979 (referred to in sub-paragraph (s) above). Completion of the sale by Gwei was to be on or before January 1, 1980. I
- (v) On August 13, 1979 one Choh Yet (a director of the plaintiff company since 1974) made application to the Registrar of Titles at the Land Office for entry of a private caveat against the whole of the first, second and third portions of the estate. The grounds of that application included allegations that no money was ever due from the plaintiff company to OCF and that the transfer of the land to OCF were (to the knowledge of OCF) fraudulent and in contravention of the Articles of Association of the plaintiff company. Pursuant to that application a caveat was entered against the estate on August 15, 1979.
- (w) By an originating summons issued in the High Court of Malaya at Johore Bahru on October 24, 1979 (No. 184 of 1979) the second defendant, Perling, and Gwei as applicants sought an order against Choh Yet for the removal of the private caveat entered on August 15, 1979. In his affidavit in support of that summons

(sworn on October 24, 1979) Gwei alleged (among other things) that the sale by OCF to him under the agreement dated March 19, 1979 had been completed on July 26, 1979 by the execution of transfers by OCF to Perling as his nominee. The application made by Choh Yet on August 13, 1979 was exhibit GWK 15 to Gwei's affidavit. The grounds upon which removal of the caveat were sought were that Choh Yet had no authority to act on behalf of the plaintiff company (which could act only through its liquidator) and had no personal interest sufficient to support a caveat. On October 29, 1979 an order was made, *ex parte*, for the removal of the caveat which had been entered on August 15, 1979.

(x) On October 13, 1979 the second defendant, Perling, was registered at the land office as proprietor of the whole of the first, second and third portions of the estate.

(y) On November 27, 1979 Perling entered into an agreement for the sale of the estate to the third defendant at the price of M\$9,977,903.13. That agreement was at the same price and otherwise on the same terms (and was in substitution for) the earlier agreement dated July 6, 1979 which had been made between Gwei and Low Eng Heng (referred to in sub-paragraph (u) above). The agreement was completed on or about November 29, 1979, and the purchase money was paid or retained as follows:

(i) Payable to OCF discharge of the loan of 90 percent of the purchase price under the agreement of March 19, 1979. M\$4,636,800.00

(ii) Retained by solicitors for Perling/Gwei towards payment of real property gains tax payable in respect of the sale by OCF – see paragraph 7 of and exhibit GWK 13 to Gwei's affidavit of October 24, 1979. *M\$ 403,680.00

(*Note: the amount retained may be M\$463,680 – see paragraph (j) on page 13 of the second defendants' written submission)

(iii) Retained by solicitors for the third defendant towards payment of the real property gains tax payable in respect of the

sale by Perling – see sub-clause 3(a) of the agreement dated November 27, 1979.

iv)	Balance paid to Perling/ Gwei	M\$6,970,841.00
		M\$3,007,062.13
B	TOTAL:	M\$9,977,903.13
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(y) The sum of M\$4,636,800 payable to OCF as mortgage has (by agreement between the plaintiff and the first defendant) been retained upon deposit pending the outcome of the present proceedings.

(z) On April 9, 1980 the Official Receiver was appointed liquidator of the plaintiff company by order of the Court in the winding up. The present proceedings were commenced by the Official Receiver as liquidator by writ issued on April 12, 1980.

On these facts the parties have agreed that only 7 issues would be left for the determination of the Court. Except for counsel for the 2nd defendant, Mr. Ho Thian Cheh expressing his reservations on issues 'C' and 'E' the other counsel have not indicated their disagreements. The issues are the following:

A. Whether, at all material times before November, 1978, the second and third portions of the estate were held by the registered owners upon trust for the first plaintiff.

B. Whether the transfers of the first, second and third portions of the estate to the first defendant are void by reason of (i) section 53 of the Bankruptcy Act 1967 (as amended) or (ii) section 223 of the Companies Act 1965.

C. Whether the second plaintiff is entitled, pursuant to section 53B of the Bankruptcy Act 1967 (as amended) to recover:-

(a) from the first defendant the proceeds of the sale to the second defendant in March 1979;

(b) from the second defendant the proceeds of the sale to the third defendant in July 1979.

D. Whether the transfers of the first, second and third portions of the estate to the first defendant ought to be set aside in equity.

- E. Whether the second defendant became a constructive trustee for the first plaintiff of the whole estate and the proceeds of sale.
- F. Whether any, and if so what, monies are now owing to the first defendant secured on all or any of the proceeds of sale of the estate.
- G. Whether the 1st plaintiff is entitled to recover damages:-
- (i) for breach of trust from the 4th defendant and
 - (ii) for breach of duty from the 5th defendant.

I will deal with these issues in the order they are framed. The first issue is:

- (A) *Whether, at all material times before November 1978, the second and third portions of the estate were held by the registered owners upon trust for the first plaintiff.*

The material date when deciding this issue is November 13, 1978 when the petition for winding up of the 1st plaintiff's company was presented to the High Court at Johore Bahru.

The facts relating to this issue are as at paragraphs (f) and (g) above. The plaintiffs contend that no money was ever paid to the 1st plaintiff in consideration of the transfers of the two portions of the estate to the 4th defendant and Wong Peng Fun – paragraph 8 of the Statement of Claim at bundle B1: 2. In the case of the second portion of the estate this was admitted by the 4th defendant in his Statement of Defence – paragraph 6 (d) bundle B1: 26. In respect of the third portion, Wong Peng Fun's admission appears from the declaration of trust of March 17, 1973 (bundle C1: 57); and from his affirmation: bundle D1-115 paragraph 4.

In respect of the 4th defendant while he admitted that he did not pay any sum whatsoever as consideration for the transfer of the second portion, the counsel on his behalf contends that the 4th defendant held this second portion in trust for Dawe as appears in the latter's letter dated February 27, 1973 (Exhibit J: 20) instructing his solicitor Syarikat Ng Kong Yeam to prepare the relevant transfer document of the land.

On the contrary, as submitted by the counsel for the plaintiffs, this letter gave no assistance to

- A the 4th defendant. It merely contains an acknowledgement that the land to be transferred belonged to the plaintiff company and the transferee was to be a nominee and not to be taken as a beneficial owner.

- B I do agree with that contention by the plaintiffs' counsel and additionally as the property belonged to the 1st plaintiff, the 4th defendant cannot in law be a nominee to other than the 1st plaintiff. To establish himself as nominee to Dawe holding, whatever interest Dawe would have had in the property there must be a trust document appointing him to be so. There is no such document. In this respect the 4th defendant said that he expected Syarikat Ng Kong Yeam to prepare such a deed and that he wrote a letter to the firm as appears at bundle C2:278. This letter was dated July 4, 1978 – 5 years after the transfer document was executed and it was written in respect of a subsequent transfer of the same land to Overseas Credit Finance (OCF), the 1st defendant. Earlier to that date, on March 17, 1973, the 4th defendant had attested a deed of trust in respect of the third portion of the property for Wong Peng Fun declaring that he was holding the property in favour of the 1st plaintiff – bundle C1:57. In that situation I do not see any reason why the 4th defendant can contend that he was different from Wong Peng Fun.

- F Further, counsel on behalf of the 4th defendant also submitted that in the circumstances prevailing at that time that all the principal officers of the plaintiff company looked to Dawe for instructions for any dealings with the land the 4th defendant understood that he was holding the property for Dawe.

- G This, in my view is contrary to the 4th defendant's own knowledge about the matter. In the draft deed of release prepared by the 4th defendant himself which he sent to Syarikat Ng Kong Yeam on July 19, 1978 as appears in bundle C2: 283, he stated in the preamble in these terms:

- H “AND WHEREAS the consideration for the transfer was provided by Lian Keow Sdn. Bhd., the said Chelliah Paramjothy holds the said lands in trust for and on behalf and for the benefit of Lian Keow Sdn. Bhd.”

- I This evidence, to my mind strongly suggests that the 4th defendant knew all along that he held the property in trust for the 1st plaintiff company.

In the case of Wong Peng Fun the answer is straightforward. His declaration states that:

"... declare that I stand seized of the aforesaid land comprised in Grant No. 21955 for Lot 2679 in the Mukim of Pulai in trust for the said Messrs. Lian Keow Sendirian Berhad..."

and his affidavit at paragraph 4 bundle D1: 115 – affirming that:

Para. 4 "During the whole time I was registered proprietor, I was holding this land as trustee for Lian Keow Sdn. Bhd. who were the sole beneficial owners." and

Para. 2: "I did not pay any monies as consideration for this transaction."

On these facts I am satisfied that the answer to issue (a) is in the affirmative.

Quite apart from this issue, on behalf of the 1st defendant, it is submitted that the Court cannot properly make a finding of existence of trust in respect of the third portion when the registered owner, Wong Peng Fun is not a party before the Court. It has been proved in evidence the existence of a declaration of trust executed by Wong Peng Fun himself (bundle C1: 57) which was produced and not challenged by the defendants. On this declaration supported by his own affidavit in evidence at bundle D1: 115, the Court, in my opinion, can properly decide this issue as between the plaintiffs and the 1st defendant. On this evidence the fact that Wong Peng Fun was not cited as a party to this action is no impediment for the Court to make a finding of fact on the issue.

Issue (B) : – Whether the transfers of the first, second and third portions of the estate to the first defendant are void by reason of (i) section 53 of the Bankruptcy Act 1967 (as amended) or (ii) section 223 of the Companies Act 1965:

Section 53 (1) of the Bankruptcy Act 1967: This section as amended provides:

"53. (1) – "Every conveyance or transfer of property or charge thereon made, every payment made, every obligation incurred and every judicial proceeding taken or suffered by any person unable to pay his debts, as they become due, from his own money in favour of any creditor or any person in trust for any creditor shall be deemed to have given such creditor a preference over other creditors if the person making, taking, paying or suffering the same is adjudged bankrupt on a bankruptcy petition presented within six months after the date of making, taking, paying or suffering the same and every such act shall be deemed fraudulent and void as against the Official Assignee."

By virtue of section 293 (1) of the Companies Act 1965 this provision in the Bankruptcy Act

A applies to a company being wound up and by subsection (2) of section 293 of the 1965 Act, the date of presentation of winding up petition shall be construed as reference to presentation of bankruptcy petition in the 1967 Act. In the present case that date was November 13, 1978.

B For ease of reference section 293 is reproduced:

"Section 293 (1) Any transfer, mortgage, delivery of goods, payment, execution or other act relating to property made or done by or against a company which, had it been made or done by or against an individual, would in his bankruptcy under the law of bankruptcy be void or voidable shall in the event of the company being wound up be void or voidable in like manner.

C (2) For the purposes of this section the date which corresponds with the date of presentation of the bankruptcy petition in the case of an individual shall be:-

D (a) in the case of a winding up by the Court –

(i) the date of the presentation of the petition;
....."

In respect of the three portions of lands transferred to the 1st defendant, it is clear that the 2nd portion and the 3rd portion were not transfers made by the plaintiff company, – see Statement of facts at (p) and (q). Hence, section 53 (1) of the 1967 Act does not apply to these two portions. This is accepted by the plaintiffs' counsel. But, in respect of the 1st portion, the plaintiff company executed the transfer form in favour of Overseas Credit Finance (M) Sdn. Bhd., the 1st defendant on November 4, 1978. The date of registration of the transfer as shown on the document of title was November 21, 1978. (Statement of facts at (o)). It is therefore imperative to decide whether this transfer was, for the purpose of section 53 of the Bankruptcy Act, made at the time of execution of the transfer Form 14A National Land Code or at the time when the transfer was registered.

H Both counsel for the plaintiffs and the 1st defendant have opposing views. While the plaintiffs' counsel urged that the date of registration was material for the purpose of section 53 of the 1967 Act, the 1st defendant's counsel argued that the transfer was effectively made on the date when it was executed.

I I agree with the plaintiffs' counsel in so far that in this respect section 206(1)(b) of the National Land Code 1965 is relevant. This section provides:

"206 (1) Subject to the following provisions of this section –

- (a) [Not applicable.]
- (b) no instrument effecting any such dealing shall operate to transfer the title to any alienated land or, as the case may be, to create, transfer or otherwise affect any interest therein, until it has been registered under Part Eighteen."

In my opinion, the language in that provision is sufficiently clear. It means what it says in that the very act of registration once effected necessarily passes the interest so registered. The whole Torrens system of land registration depends on this very principle and any derogation from it would cause the land title to be inconclusive. As Lord Wilberforce puts it:

"It would be destructive of the whole system of land registration" — See *Frazer v. Walker*.⁽¹⁾

But counsel on behalf of the 1st plaintiff argues it in another way. He contends that two important elements were missing in these transactions resulting that there were no obligations created which were capable of being specifically enforced by the 1st defendant. These elements are firstly, there was no contract between the 1st plaintiff and the 1st defendant for the sale of this portion of the estate; and secondly, the 1st defendant did not pay the purchase money at the time of execution of the transfer. He argues that in the absence of such obligations, the transfer of the plaintiff company's beneficial interest in that portion could only be effected at the same time as the transfer was registered and therefore the basis upon which the vendor has been held to be a bare trustee for other purchaser as in cases referred to by the 1st defendant's counsel do not exist. The passages in judgments referred to are *Bachan Singh v. Mahinder Kaur & Ors.*,⁽²⁾ *Ong Chat Pang & Anor. v. Valliappa Chettiar*⁽³⁾ and others.

I do not accept this argument as representing the law. To do so, in my view, will open the flood gates to many litigations questioning the certainty of land registrations on equitable ground or for that matter, insufficiency of consideration which is not envisaged by the principle of indefeasibility of titles in the National Land Code 1965. I will deal with this contention later in the 1st defendant's argument.

The second question is whether section 53 (1) of the Bankruptcy Act can have application to a transfer made after presentation of the petition for winding up.

Relying on her earlier argument on beneficial

- A interest, the plaintiffs' counsel now contends that the plaintiffs are not concerned to set aside the transfer of the registered title but would rely instead for the purpose of section 53 of the Bankruptcy Act on what date the beneficial interest was transferred. This indicates a change of stance from the counsel's opening address (page 26 Notes of Evidence) and should not be allowed for the reasons given below.

- B However, on this second question and in determining the expression "within six months after the date of making (a transfer)" in section 53 (1) is to be properly construed as "*before the end of six months* after the date of making the transfer" or as "*during the period of six months* after the date of making transfer", the plaintiffs' counsel argues that the mischief rule should apply. He submits that in practice, the mischief is likely to occur during the period between the presentation of the petition and the adjudication when the property was under the *de facto* control of the person to be adjudged bankrupt as it is before presentation of the petition. He submits that the provision was directed to avoid a lacuna during that period and to read the expression in section 53 (1) in the sense as "*before the end of six months* after the date of making the transfer" has this effect. In this way he argues that section 53 (1) is capable of applying to the transfers whether made before November 13, 1978 or after that date.

- F I do not accept this argument. In my opinion the plaintiffs' counsel stretches the language in the provision beyond its limit and contrary to the intention of the legislation. In my opinion, in plain language the period of "within six months after the date of making (the transfer)" in the sub-section stops at the date of presentation of the petition to wind up. The period specified may be less than 6 months as qualified by the word "within" appearing in the sub-section which connotes its limit and may not proceed beyond the date of presentation of the petition. There is clear authority that the English equivalent to section 53 (1) does not apply to a disposition made after the date of the petition — see *Halsbury's Laws of England* 4th Edition Volume 3 para. 919.

- I The 1st defendant on the other hand, advances the same argument as his submission below on section 223 of the Companies Act. I have considered that argument and in spite of that submission, I hold that section 53 (1) of the Bankruptcy Act 1967 does not invalidate the transfer of the first portion of the estate to Overseas Credit Finance.

In that event there is no need to consider the other grounds advanced by the plaintiffs. A not be allowed.

Section 223 of the Companies Act 1965:- This section provides:

"223. Any disposition of the property of the company including things in action and any transfer of shares or alteration in the status of the members of the company made after the commencement of the winding up by the Court shall unless the Court otherwise orders be void."

The commencement of the winding up of the plaintiff company was November 13, 1978. I have held earlier that the disposition of all the 3 portions of the 1st plaintiff's estate occurred after the commencement of the winding up i.e. at the dates of registration of the transfers. On the face of this provision, the disposition of the three portions are invalid.

It is now the plaintiffs' contention that such disposition is not invalidated for the reason that it was the beneficial interests in the several portions of the estate that the plaintiff company disposed and not the registered title. It follows that from the dates of respective registrations of the transfers (November 21 to 30, 1978), the 1st defendant held the estate as bare trustee for the plaintiff company. In support of this contention the plaintiffs adopted the principle in *Gorringe v. Irwell India Rubber & Guttar Percha Works*⁽⁴⁾ cited by the 1st defendant.

The equitable right in beneficial interest is an entirely new argument raised for the first time by the plaintiffs' counsel and I agree with the 1st defendant's counsel that it represents a fundamental change in the case that has been proceeded so far. The plaintiffs' statement of claim at paragraph 16 in B1-7; the plaintiffs' prayer at para. A (5) at B1-10 and the plaintiffs' counsel's opening address at page 26 of the Notes of Evidence all show that it was the plaintiffs' case that section 223 of the Companies Act invalidates the transfers of the registered titles and that in spite of section 340 of the National Land Code the indefeasibility provision respecting the registered title, the 1st defendant held the estate as bare trustee for the 1st plaintiff.

In my opinion, when the case is drawn to its close it is not now open to the plaintiffs at this late stage in the proceedings to change the fundamental issue of the case and more so when it is contrary to the plaintiffs' original pleadings. This, in my opinion, is prejudicial to the defendants and should

The 1st defendant maintains that it is their case that the transfers were effectively made when executed and not only when registered and it is also their argument for both the purpose of section 53 (1) of the Bankruptcy Act and section 223 of the Companies Act that all the 3 transfers were executed before but registered after November 13, 1978. Relying on the decision of the Court of Appeal in *Gorringe v. Irwell* he contends that as on November 13, 1978 the 1st plaintiff was not entitled to any part of the estate against the 1st defendant. The 1st plaintiff and the legal owners of the second and third portions had done all that was necessary on their part to transfer the land.

In *Gorringe v. Irwell's* case, the Appeal Court had to consider the application of the equivalent section 153 of the English Companies Act 1862 to an assignment by a company of a debt made before winding up where notice of the assignment had not been given to the debtor until after commencement of the winding up. The Court held the section not to apply because as between assignor and assignee the assignment was complete before the commencement of the winding up. The passage referred to was Cotton L.J.'s judgment at page 133 which said:-

"It (i.e. the section) really refers to dispositions by the company of property that belonged to the company at the date of the commencement of the winding up."

In my view, *Gorringe's* case cannot assist the 1st defendant's contention in this case as different rules apply on the disposition by assignment of a debt and the transfer of lands under the National Land Code, whereas for assignment of a debt a notice of assignment given to the debtor suffices and finalises the transaction, the requirement of effecting a land transfer under the National Land Code involves many stages and is conclusive only with the registration of the registered title — section 206 (1) (b) National Land Code. At the stage of execution the transfer is not conclusive.

In support of his proposition that once the transfers had been executed as against the 1st plaintiff, the 1st defendant was entitled to the land, the 1st defendant's counsel cited *Bachan Singh v. Mahinder Kaur & Ors.*⁽²⁾; *Ong Chat Pang & Anor. v. Valliappar Chettiar*⁽³⁾ and others as his authorities.

While I agree that there are passages in those authorities supporting his contention, in my view

the facts there are distinguishable. Taking two of these cases; in *Bachan Singh's* case, the fact was that the transfer could not be registered because of the delay and that one of the original transferors had died and an application was made to the Court requiring the Registry of Titles to effect the transfer. Similarly in *Ong Chat Pang's* case, the claim there was for specific performance of an agreement for sale of land but before the execution of a proper transfer the vendor purportedly sold the land again to another.

In our present case all that was necessary had been done and the transfers were registered under the National Land Code. Upon registration of the registered title in my opinion, the purchaser's equitable interest vested in him as legal title and became indefeasible. It can then only be impugned under one of the grounds provided in section 320 (2) of the National Land Code or other statutory remedies. To hold otherwise would open the principle of indefeasibility of titles to mischief.

The discussion on equitable rights of a purchaser is relevant in these cases in order to enforce the purchaser's equitable rights to specific performance of agreement for sale from competing claims before registration.

In *Abigail v. Lapin*⁽⁵⁾ Lord Wright in discussing the Torrens System said:-

"It is a system for the registration of title, not of deeds, the statutory form of transfer gives a title in equity until registration, but when registered it has the effect of a deed and is effective to pass the legal title."

The present view of our Courts is to preclude the introduction of equitable principles to land tenure or interests in immovable property in Malaysia — see *Pemungut Hasil Tanah Kota Tinggi v. UMBC Bhd. & Anor.*⁽⁶⁾

This view has been confirmed by Lord Keith in the same case on appeal to the Privy Council,⁽⁷⁾ who said:

"The National Land Code is a complete and comprehensive code of law governing the tenure of land in Malaysia and the incidents of it, as well as other important matters affecting land there, and there is no room for the importation of any rules of English law in that field except in so far as the Code itself may expressly provide for this."

In these words it would appear that the door is now shut to the proponents of equitable remedies in respect of land tenure here.

In this view, the passages from both cases are

A of no assistance to the 1st defendant's argument. They must be construed with the view of those facts argued before the Court. For these reasons, I hold that for the purpose of section 223 of the Companies Act 1965, the disposition of the property in the three portions of the estate was made at the date of registrations and it was so made after the date of commencement of the winding up and therefore void.

B
C Issue C:- Whether the 2nd plaintiff is entitled, pursuant to section 53B of the Bankruptcy Act 1967 (as amended) to recover:-

a) from the 1st defendant the proceeds of the sale to the 2nd defendant in March 1979;

b) from the 2nd defendant the proceeds of the sale to the 3rd defendant in July 1979:

D Section 53B of the Bankruptcy Act is in these terms:

E "(1) Where a person has acquired property of the bankrupt under a transaction that is void or under a voidable transaction (that is subsequently set aside) and sold, disposed of, realized or collected the property or any part of it, the money or other proceeds from any such dealing, whether further disposed of or not, shall be deemed to be the property of the Official Assignee.

F (2) The Official Assignee may recover the property referred to in subsection (1) or its value or the money or other proceeds therefrom from the person who acquired it from the bankrupt or from any other person to whom the person may have sold, resold or transferred the property or paid over the money or other proceeds therefrom as fully and effectually as the Official Assignee could have recovered the property if it had not been so sold, transferred, disposed of, realized or collected.

G (3) Notwithstanding subsections (1) and (2), where any person, (not being the person who acquired the property from the bankruptcy) to whom the property was sold, resold or otherwise disposed of, had paid or given therefor valuable consideration and acted in good faith such person shall not be subject to the operation of this section and the Official Assignee's recourse for recovery of the consideration so paid or given or its value shall be solely against the person who entered into the transaction with the bankrupt."

H
I In this issue the plaintiffs accept that the provision of this section applies only if section 53 (1) of the same Act is found to apply in the transaction attacked and it applies only to the estate transferred by the 1st plaintiff company to Overseas Credit Finance, the 1st portion.

I have earlier held that section 53 (1) of the Bankruptcy Act does not apply to the transfer of the first portion of the estate to Overseas Credit Finance. It follows that section 53B (1) has no application to Overseas Credit Finance. But if I am wrong, it is necessary to consider the plaintiffs' submission there. The plaintiffs contend that section 53B is made applicable by section 293 (1) of the Companies Act 1965 by the words "in like manner."

I agree with the plaintiffs' counsel that by virtue of section 35 (1) of the Interpretation Act 1967, the reference to the law of bankruptcy in section 293 (1) of the Companies Act refers to the Bankruptcy Act 1967 as amended. That is the only particular law we have on bankruptcy. The material part of section 35 (1) is:

"35. (1) — A reference to a particular written law —

(a) is a reference to that law as amended or extended from time to time";

In construing section 35 (1), I also agree that reference in section 293 (1) of the Companies Act to the law of bankruptcy includes reference to that law relating to voidable transfers as amended and extended in section 53B. In that context, I accept that the words "in like manner" mean "with like consequence" or I would say "with like effect."

A reproduction of section 293 (1) of the Companies Act 1965 is at page 63 above.

On this consideration of section 293 (1) of the Companies Act and by virtue of section 53B of the Bankruptcy Act, the 2nd plaintiff can subject to sub-section (3) trace the proceeds of sale of the first portion of the estate in the hands of the 1st and 2nd defendants.

I accept that if by virtue of section 53 (1) of the Bankruptcy Act it is found that the 1st defendant had acquired the property under a transaction that is void, it is clear that sub-section (3) of section 53B does not provide a defence to the 1st defendant. It follows that the 2nd plaintiff is entitled to recover the proceeds of sale from the 1st defendant as prayed, subject of course to the validity of the charge respecting the property.

On the other hand, the sub-section does provide a defence to the 2nd defendant, Sungei Perling Holdings Sdn. Bhd. if it can show that it had given valuable consideration and it acted in good faith. From his submission, counsel for the 2nd defen-

dant identified two questions which the plaintiffs accepted that if either of those was answered in the affirmative, the 2nd defendant's defence in section 53B (3) would fail. The question are:-

(a) Is the consideration of \$5,152,000 paid by Sungei Perling Holdings Sdn. Bhd. to the 1st defendant a substantial undervalue;

(b) Did Sungei Perling Holdings have notice of the plaintiffs' claim to the estate prior to the registration of the said property in its name on October 30, 1979;

That seems to be the line of argument which is not denied by the 2nd defendant's counsel in his reply. I therefore consider that the 2nd defendant has abandoned his lengthy submission on other aspects of the case and I will deal with the agreed proposition accordingly.

The onus of proving good faith and valuable consideration is upon the 2nd defendant who seeks to rely on it.

In order to prove question (a) that the property was not bought at substantial under-value, the 2nd defendant relies on the Government Valuer's report — bundle P — which shows the market value of the property at the relevant time in March 1979 was around \$4,000/- to \$5,000/- per acre. This opinion was supported by another valuer DW. 2.

The plaintiffs, however, contend that the fact shows otherwise. In the earlier contract of March 19, 1979 between Overseas Credit Finance and Gwei Way Kiat (bundle C2-323), the 2nd defendant was not a party. The 2nd defendant was incorporated on May 11, 1979 — Statement of facts at (t). On July 6, 1979 Gwei as Managing Director of the 2nd defendant had agreed to sell the estate to the nominee of the 3rd defendant at \$9,977,903.13 (bundle C2-345A to E). On July 25, 1979, Overseas Credit Finance by letter indicated for the first time that the 2nd defendant had agreed to purchase the estate (bundle J-64). By July 26, 1979, the consideration of \$5,152,000/- was paid to Overseas Credit Finance, the 1st defendant (bundle H-59). From these facts, it can be deduced that by July 26, 1979, the 2nd defendant knew that the value of the estate was not less than \$9,977,903.13.

I agree that, that is a fair deduction of the facts established and it is apparent that the answer to

the first question is in the affirmative.

On the question relating to good faith in (b), the fact to be decided is whether Sungei Perling Holdings had knowledge of the plaintiffs' claim before October 30, 1979 – the date when the 2nd defendant was registered as proprietor of the whole estate. The factor here is whether Choh Yet's caveat filed on August 15, 1979 against the properties constitutes knowledge to the 2nd defendant as a claim by the plaintiffs.

The argument advanced by the 2nd defendant is that no such knowledge could be imputed because Choh Yet was not a director of the plaintiff company at the relevant time, and he filed the caveat in his individual capacity. Most importantly, he argues, the caveat was filed too late, that is after the property had been vested in Sungei Perling Holdings on July 26, 1979.

The evidence, it seems, does not support this argument. The caveat filed by Choh Yet was as Managing Director and Secretary of the plaintiff company (C2-419). The evidence that he did so as an individual and not a director of the plaintiff company came about only during this proceeding (2nd defendant – at pages 222 to 223 Notes of Evidence). The grounds on which the caveat was removed was because the plaintiff company was under winding up order and in receivership and therefore the company had no caveatable interest. (bundle C2-398 to 401). To that extent in my view, Perling *i.e.* 2nd defendant, in the process of removing the caveat on October 24, 1979 had knowledge of the plaintiffs' claim against the property. I therefore find that the answer to the 2nd question is also in the affirmative.

The 2nd defendant further argues that as all the transactions between Overseas Credit Finance and Sungei Perling Holding and Pelangi were above-board *i.e.* with proper agreements, caveats and statutory transfers executed, there cannot be an inference of absence of good faith. In countering this argument, the plaintiffs' counsel refers to the facts that:

- (a) the agreement dated July 6, 1979 was not disclosed by the 2nd defendant and
- (b) the valuer DW.2 called by the 2nd defendant said that he had not been told by the 2nd defendant of the existence of either the contract of March 19, 1979 or of July 6, 1979 (Notes of Evidence at page 361) when he was asked to value the property.

A The plaintiffs' counsel contends that on those evidence there was concealment of these material facts by the 2nd defendant.

B On these facts I agree with the plaintiffs' counsel that there were these factors concealed by the 2nd defendant which were material to the transaction between the 1st and the 2nd defendant and that this concealment amounts to bad faith on the part of the 2nd defendant.

C The 2nd defendant's counsel's next argument is that by July 26, 1979, the property had already been vested in Sungei Perling Holdings. Implicit in this contention is the same question whether the beneficial interest in the property vested in the purchaser at the time of execution of the transfer (July 26, 1979). This issue has been dealt with in the discussion on section 223 of the Companies Act (above) where I held that in the circumstances of this case it did not.

E For these reasons, if section 53 (1) of the Bankruptcy Act 1967 is found applicable I hold that the 2nd defendant is not entitled to rely on the defences provided in section 53B (3) of the Act.

Issues D and E:- This issue D may be considered together with issue E. They are alternative issues to B and C and are in these terms:

- F (D) – *Whether the transfers of the first, second and third portions of the estate to the 1st defendant ought to be set aside in Equity.*
- G (E) – *Whether the 2nd defendant became a constructive trustee for the 1st plaintiff of the whole estate and the proceeds of sale.*

H In this issue D the plaintiffs' counsel began by saying that the plaintiffs' concern is to avoid or set aside any transfers of beneficial interest in any portion of the estate from the plaintiff company to Overseas Credit Finance in September or November 1978; and concludes that the plaintiffs contend the transfers ought to be set aside in equity with the consequence that Overseas Credit Finance I became a constructive trustee for the plaintiff company.

Earlier in the opening address, the plaintiffs had apparently abandoned the plea of constructive trusteeship in not making submission on the plea against the 1st defendant and now under issue E

the plaintiffs presently abandon this plea against the 2nd defendant in the light of the decision in *Tham Kok Leong v. Low Kim Hai*.⁽⁸⁾ That case decided that by reason of section 6 of the Civil Law Act (Revised 1972), the English doctrine of equitable notice has no application to land dealings in Malaysia. See also *U.M.B.C. Bhd. & Anor. v. Pemungut Hasil Tanah, Kota Tinggi*.⁽⁷⁾

Now the plaintiffs seek to resurrect this plea again at this late stage of their submission in reply. In my view, to allow the plaintiffs to do so would prejudice the 1st defendant's case. It amounts to allowing the plaintiffs to blow hot and cold at the same time and to allow the plaintiffs to renege their acceptance of the law in issue E. I therefore disallow this new argument.

In this event I will deal with these issues as they were originally sought to be established by the plaintiffs. In doing so I will not consider new issues of facts raised by the plaintiffs for the first time in their submission in reply as at items (i) to (iv) page 63 thereof. These are prejudicial to the defendants without giving them the opportunity to adduce rebutting evidence material to those facts.

There were four grounds originally raised by the plaintiffs on these issues. These are, first:

- a) *The transfers were never authorised by the Board of Directors of the 1st plaintiff and this must have been known to the 1st defendant.*

In this respect, the bone of contention by the plaintiffs is the resolution of the 1st plaintiff company at bundle P-142. This resolution produced by the 1st defendant purports to authorise the transfers of the 3 portions of the estate – para. 3 thereof. The plaintiffs contend that:-

- (a) the resolution was not in the plaintiff company's minute book and therefore is a *prima facie* evidence that the meeting did not take place.
- (b) the document is not a minute of the meeting but purports to be a resolution in writing pursuant to Article 136 of the plaintiffs' Article of Association which requires all the directors to sign and
- (c) the document was signed by only two of the directors.

A The 1st defendant's explanation to this is that the resolution was found by Mr. Kay, an officer of Overseas Credit Finance, in his file in September or October 1978 – (pages 272D and 314E of the Notes of Evidence). On the evidence that there is no record in the plaintiff company's minute book, it is not shown that anyone in the 1st defendant's company knew about it. On the plaintiffs' contentions at (b) and (c), the 1st defendant relied on *Royal British Bank v. Turquand*.⁽⁹⁾ and said that they can assume that the resolution was properly passed. There is also no evidence to show that the 1st defendant knew that Choh Yet and another director's consent was required to make the resolution valid.

B In *Royal British Bank v. Turquand*,⁽⁹⁾ it was held that a 3rd party is entitled to deal with a company in a transaction within the company's objects on the assumption that the dealing is properly authorised in accordance with the company's constitution.

C I am satisfied with the 1st defendant's explanation as reasonable and that with the resolution at F-142 in their hands before the transfer was executed, they can assume that the transfer was properly authorised by the 1st plaintiff company.

D The resolution at F-142 also resolved to instruct the 4th defendant to make a transfer and I am satisfied that the 1st defendant were entitled to assume that it represents a proper resolution of the 1st plaintiff company authorising disposition of the trust property by the 4th defendant in the 2nd portion of the estate.

E As regards the 3rd portion of the estate, the 1st defendant's acceptance of the transfer from Wong Peng Fun, the same argument should apply. The 1st defendant can properly rely on either the resolution at F-142 or F-117, both resolutions clearly authorised Wong Peng Fun to execute the transfer of the trust property to Overseas Credit Finance and resolution F-117 also indemnified Wong Peng Fun for doing so.

F The plaintiffs' contention that resolution F-142 could not have existed is mere speculation and not supported by evidence.

G Secondly (b) – *the transfers were made at a significant undervalue and that must have been known to the 1st defendant.*

H The plaintiffs did not refer to this ground in

their submission in reply. In his opening address the plaintiffs' counsel contended that the whole estate was transferred to the 1st defendant in October, 1978 at a price of \$5,070,000/- which works to an average price of \$5,677/- per acre. They seek to prove that the value of the estate in October to November 1978 was at \$6,500/- per acre.

The valuation evidence of this property before the Court though not made for the purpose of this sale shows differently. First valuation of the whole estate as at April 15, 1976 gave a value of \$2,140,350/- bundle C1-188. The reserved price fixed for auction of the estate by the Court was based on this valuation.

Second valuation — bundle H-43, as at March 19, 1979 was \$4,915,000/- i.e. at \$5,500/- per acre.

It is only the 1st plaintiff's valuer Mr. K. Parampathy who assessed the value of the estate as in October — November 1978 at \$6,500/- per acre. But this valuation made five years later, contradicts the government valuer's assessment of the property (3rd portion) at \$2,500/- per acre as on November 30, 1978 — see exhibits A to E in his report at bundle P.

In absence of evidence to the contrary, it is improbable to assume that on the basis of the 1st and 2nd valuation above, the value of the property had increased to \$6,500/- per acre in October 1978. On this basis I find that there is no evidence to support the contention that the transfers of the property were made at a significant undervalue.

Thirdly — (c) *The transfers were purportedly made in the satisfaction of a debt owed by the 1st plaintiff and in computing that debt the 1st defendant had charged interest at a rate to which it was not entitled. So the amount was higher than it should be.*

Even assuming that this ground is true that is, by devious calculation of the rate of interests by the 1st defendant, it escalated the amount owing from \$3,453,258.52 as on April 13, 1976 (bundle C1-206) to \$4,510,139.00 on October 31, 1976, this amount was still in excess of the value of the estate as on November 30, 1978 if based on the assessment by the Government valuer. For this reason I agree with the 1st defendant's counsel that this ground cannot be a basis for setting aside the transfers.

A Fourthly and the last ground — (d) — *The transaction was made at the direction of the 1st defendant and was not a transaction at arm's length between the parties.*

B In his opening address on this ground, the plaintiffs' counsel gave a long resume about the collapse of Mosbert group of companies and particularly the difficulties Overseas Credit Finance had with Bank Negara during that period. He reasoned that those difficulties resulted in OCF giving instructions to the firms of Wong & Paramjothy and Hassan & Kong Yeam to prepare transfers of the 2nd and 3rd portions of this estate referred to earlier.

D Even assuming those reasons were true, the evidence shows that the transfers were properly authorised and executed with valuable considerations, I do not see any oppression or any unconscionable dealing as to justify equity to intervene or as submitted by the 1st defendant's counsel as proof that the transfers were made at the direction of the 1st defendant unduly.

E The plaintiffs further referred to the evidence that the suggestion that the estate should be transferred to the 1st defendant in satisfaction of the 1st plaintiff's indebtedness was originally put to Choh Yet on behalf of the 1st plaintiff company (Notes of Evidence — 271E). What is more important, in my view, is the evidence that subsequently the authority of the 1st plaintiff company to these transfers was obtained as is apparent in the company's resolution at F-142. With this resolution of the board of directors it cannot be construed that the transfers were conducted at the dictates of the 1st defendant. For these reasons I am satisfied that all the four grounds are not established and I hold that no case has been made out on this issue D.

Issue E:- This issue has been abandoned.

H *Issue F:- Whether any, and if so what, monies are now owing to the 1st defendant secured on all or any of the proceeds of sale of the estate.*

I The question in this issue arises only if I am wrong in holding that the plaintiffs cannot succeed in setting aside the transfers in issues at B or D or that the transfers were not void for purposes of section 223 of the Companies Act 1965. This is because if the transfers remain, it is no longer necessary to consider whether the property is charged to secure the debt since it is the plaintiffs' case that the transfers were made in satisfaction of

the 1st plaintiff's indebtedness to the 1st defendant. In the event of the above contingency I proceed to consider this issue.

There were 2 charges executed in respect of the 1st plaintiff's estate, the 1st portion dated December 23, 1972 and the 2nd and 3rd portions in December 1975 — see statement of facts at paragraphs (c), (j) and (k).

1st portion: As to the charge over this portion the plaintiffs contend as follows:

- "(i) That, on a true analysis of the facts, no moneys were lent by OCF to the plaintiff company in December 1972;
- (ii) That the charge was executed to secure moneys lent by OCF to Pan Orient Enterprises Limited;
- (iii) That it was a breach of duty by those directors of the plaintiff company who procured the execution of the charge (namely the 5th defendant Yap Fui Cheng and Wong Wen Ha) to charge property of the plaintiff company for the benefit of Pan Orient Enterprises when they know that the plaintiff company had received no consideration for the charge and that the creation of the charge was detrimental to the interests of the plaintiff company.
- (iv) That OCF knew of the breaches of duty described above, and accordingly is not able to rely on the charge.
- (v) That the plaintiffs are not estopped by the order made in suit 83 of 1975 from disputing in these proceedings that no money was lent by OCF to the plaintiff company in December 1972 or that the charge is invalid as between the plaintiff company and OCF."

On the contentions at (i) and (ii), the incontroverted facts are these:-

- a) On December 7, 1972 OCF paid M\$1,450,000 from its account with United Malayan Banking Corporation Bhd., Kuala Lumpur main office (see the statement at bundle F page 177) to Syarikat Ng Kong Yeam. Ng Kong Yeam paid that sum into his client's account with UMBC — see bundle J page 72 — and credited that sum to the account of OCF in his client's ledger (L 48) — see bundle J page 73 (first entry).
- b) Also on December 7, 1972 Ng Kong Yeam paid M\$1,450,000 from his client's account with UMBC to Pan Orient. The ledger entry at bundle J page 72 (second line) reads:-

"... December 7th M/s Pan Orient Enterprises from Overseas account..."

Ng Kong Yeam debited that sum to the account of OCF in his client ledger (L 48) — see bundle J page 73 (second entry).

- c) Also on December 7, 1972 Pan Orient paid M\$1,045,940.90 to OCF, to settle the accounts of Allstate Assurance Corporation (M\$995,940.90) and Endau Saw Mill (M\$50,000) — see bundle E page 73. This sum was paid by OCF into its account with UMBC, Johore Bahru branch — see bundle F page 178.

- d) On December 9, 1972 OCF paid M\$1,025,000 from its account with UMBC, Johore Bahru branch (bundle F page 178) to Syarikat Ng Kong Yeam. Ng Kong Yeam paid that sum into his client's account with UMBC — see bundle J page 72 (third entry) — and, again, credited that sum to the account of OCF in his client ledger (L 48) — see bundle J page 73 (third entry).

In summary — these two payments were made two to three days apart. The 1st payment was from OCF to Kong Yeam and then to Pan Orient and then back to OCF. Then it is available to make the 2nd payment. It goes from OCF to Kong Yeam and then to Pan Orient.

- F The question is whether when Ng Kong Yeam received the monies from OCF and disbursed those monies to Pan Orient, he acted so as solicitor for Overseas Credit Finance or as solicitor for the plaintiff company.

- G Relying on rule 13 (a) of the Rules of Practice and Etiquette of the Bar Council requiring a solicitor to keep an account of each of his client, the plaintiffs' counsel reasons that the sums were never entered in any ledger kept in the plaintiff company by Ng Kong Yeam and for that reason he contends that the monies were paid by OCF to H Pan Orient and not paid to the plaintiff company.

- I In my opinion, it is too presumptuous for the plaintiffs to assume such evidence of fact not to exist by relying on mere non-compliance to practice procedure. Such presumption cannot be conclusive. Some explanations from Ng Kong Yeam are necessary and this was not done when he was subpoenaed by the plaintiffs to produce the ledger referred to. On the other hand, contrary evidence shows that the letter at bundle F-11 in which Ng Kong Yeam expressly stated that he was acting on behalf of the 1st plaintiff when he

requested the 1st defendant to release the loan to the borrowers.

The following letters at F-13 to F-15 from the 1st defendant releasing the monies to Ng Kong Yeam expressly referring to the letter at F-11 also clearly imply that Ng Kong Yeam acted for the 1st plaintiff.

From financial account of the 1st plaintiff for the year ended June 30, 1973 – bundle C1-130, the balance sheet shows a total indebtedness of \$3,300,000/- (two payments of \$2,500,000/- plus \$800,000/-) representing the sums borrowed from the 1st defendant and a contra entry on the assets side or similar sums as loans to Pan Orient. This inclusion of Pan Orient's debt in the plaintiff company's balance sheet as well as its statement of affairs (C2-363) and treating the loan to Pan Orient as asset of the company and declared it to be correct by its director (C-129) and (C2-355) clearly show that the 1st plaintiff had acknowledged payment of the sums borrowed from the 1st defendant.

On the contentions at (iii) & (iv) and referring to the circumstances in which the charge was executed, the plaintiffs' counsel reasons that the charge was procured by Yap Fui Chong (5th defendant) and co-director Wong Wen Ha for a loan to Dawe. There was no compensatory benefit for the 1st plaintiff and it is submitted that there was therefore a breach of duty by Yap and Wong Wen Ha. As Dawe was in control of the affairs of Overseas Credit Finance at the relevant time as a person who directed the charge to be approved, he urges that Dawe must have known all the facts relating to that breach of duty. He relies on section 4 (1) of the Companies Act 1965 for this proposition. The section provides:

"4 (1) In this Act unless the contrary intention appears: 'director' includes any person occupying the position of director of a corporation by whatever name called and includes a person in accordance with whose directions or instructions the directors of a corporation are accustomed to act and an alternate or substitute director;"

I am in agreement with the 1st defendant's counsel that the definition of the word "director" in section 4 (1) of the Act applies only for the purpose of construing any provision of the Act in which such word appears. It is therefore irrelevant to the plaintiffs' argument which is not founded on any provision of the Companies Act. Apart from that the plaintiffs' proposition is not supported by

A authority. In a similar argument advanced in *Re David Payne & Co. Ltd.*⁽¹⁰⁾ Romer L.J. in his judgment said:

B "In the first place, where you have a limited company with a memorandum of association authorizing the company to embark on a series of transactions; if among those purposes you find a power to borrow generally for the purposes of the company, I take it to be clear beyond controversy at the present day that, when money is being borrowed within the limits of the power of borrowing as to amount, the person who lends the money is not bound to inquire to what purpose the borrowing company is about to apply the money so borrowed; and if *David's case* is an authority to the contrary, I cannot agree with it. The only other question is as to imputed notice. I take it that there was a transaction between the Exploring Land and Minerals Company and David Payne & Co. of this kind. The first company lent 6000¹ secured by a debenture of the second company. Now that transaction was intra vires the second company. But there was some evidence to show that it was intended by some of the directors of the second company to apply the money for purposes not authorised and altogether improper qua the second company. Now, one director of the first company knew how that money was going to be applied. He acquired that knowledge through some conversation which he had with some people in his private capacity before that transaction was carried out by the lending company. The question is whether, inasmuch as that director took part on behalf of his company in authorising the lending of the money and the acquisition of the debenture and assisted in carrying out that transaction, the knowledge of that director so acquired is to be considered the knowledge of the lending company. Is that knowledge as a matter of law to be imputed to the lending company? In my opinion no such notice can be imputed at law. I take it that in such a transaction the lending company was not bound to inquire as to the application of the money at all by the borrowing company. That being so, it appears to me that knowledge independently acquired by a director in his personal capacity in respect to a matter which was irrelevant so far as concerned the lending company is knowledge which cannot be imputed to the company, for it was knowledge of something which really did not concern the lending company as a matter of law. Therefore, you cannot imply a duty on the part of the director to have told these facts to the lending company, or a duty on the part of the lending company to have inquired into that question. The lending company not having any reason to know how the money was to be applied apart from the knowledge of the director, it would have been wholly improper for the agent of that company to have inquired into the question of the application of the money. That being so, there was no legal duty on the director to impart his knowledge, nor any duty on the part of the company to have acquired the knowledge. Apart from the knowledge of the director, no knowledge in fact was proved against the lending company." (Emphasis supplied).

I Thus even assuming that Dawe had been a director of Overseas Credit Finance, the 1st defendant, his knowledge would not have been imputed to the 1st defendant. *A fortiori* since he was not.

Having decided that the plaintiffs cannot

succeed in items (i) to (iv) of their contentions I find that the issue of estoppel in item (v) does not arise. There is therefore no necessity to consider that issue.

2nd and 3rd portions: The 3rd portion of the estate registered in the name of Wong Peng Fun was charged on December 20, 1975 and the 2nd portion registered in the name of Paramjothy (4th defendant) on January 7, 1976. Both charges were in favour of Overseas Credit Finance as chargee.

Referring to the evidence of Choh Yet (Notes of Evidence at 545) on examination-in-chief in which he denied that he had given instructions to Paramjothy to prepare these two charges as securities to O.C.F., the absence of the plaintiff company's resolution authorising creation of the charges and the absence of correspondences between the 1st plaintiff company and Paramjothy or Wong Peng Fun; the plaintiffs' counsel urges the Court to find as a fact that the execution of the charges by Paramjothy & Wong Peng Fun were procured by O.C.F. without the authority of the 1st plaintiff company. He reasons that this was breach of duties on the part of the registered owners. It is thus argued that since O.C.F. (through Dawe) were aware that the 2nd and 3rd portions were held in trust for the plaintiff company, they knew all the facts which constituted the breach of trust.

This argument is similar to the proposition formulated in his contentions at items (iii) and (iv) in respect of the 1st portion of the estate. Similarly, I hold that this proposition cannot succeed in view of section 6 of the Civil Law Act 1956 (Revised 1972) and the principle in *Re David Payne & Co. Ltd.* (above).

The plaintiffs next rely on section 108 of the Companies Act 1965. The provision states:-

108 — "(1) Subject to this Division where a charge to which this section applies is created by a company there shall be lodged with the Registrar for registration within thirty days after the creation of the charge a statement of the prescribed particulars and:-

- (a) the instrument (if any) by which the charge is created or evidenced; or
- (b) a copy thereof together with an affidavit verifying the execution of the charge and also verifying the copy as being a true copy of the instrument;

A and if this section is not complied with in relation to the charge the charge shall, so far as any security on the company's property or undertaking is thereby conferred, be void against the liquidator and any creditor of the company."

B The 1st defendant's reply to this contention is that the charges of the 2nd and 3rd portions of the estate were not created by a company as envisaged by section 108 of the Act. They were created by the 4th defendant and Wong Peng Fun, the registered owners as shown on copies of charges at C1-172 and C1-156 and therefore not subject to registration under the Act.

C The plaintiffs countered this by further contending that the plaintiffs were not concerned with the legal charge over the registered title but now contend that the question is whether the plaintiff company's beneficial interest in the 2nd and 3rd portions of the estate is subject to any equitable charge to secure monies alleged to be owing to Overseas Credit Finance.

D This is an entirely new issue raised by the plaintiffs and in any event, I agree with the 1st defendant's response that the plaintiffs' argument cannot be sustained in view of the relief the plaintiffs sought, i.e. to declare that the charges over the 3 portions are unenforceable by the 1st defendant. The pleadings, in my view, necessarily referred to the legal charges on the 3 portions of the estate.

F It is also not shown in evidence that an equitable charge was intended by the parties as in the case of *Re Wallis & Simmonds (Builders) Ltd.*⁽¹¹⁾ referred to by the plaintiffs. There, the Court had to decide the effect of deposit of title deeds with the chargees and it was held that there was an implied equitable charge on land which reads into the contract the charge which is implied. So the charge becomes registrable under section 95 of the United Kingdom's Companies Act (equivalent to section 108 of our Act).

H I find that *Re Wallis & Simmonds* is of no assistance to this proposition by the plaintiffs. In that situation I reject the plaintiffs' argument and hold that section 108 of the Companies Act does not apply to the 2nd and 3rd portions of the estate, I the 1st portion having been registered.

Issue G:- Whether the 1st plaintiff is entitled to recover damages: (i) for breach of trust from the 4th defendant and (ii) for breach of duty from the 5th defendant.

(i) 4th defendant:- The claim against the 4th A everybody else in the 1st plaintiff company.
defendant may be summarised as follows:

- (i) On April 7, 1973 the second portion of the estate was transferred by the plaintiff company to the 4th defendant as trustee.
- (ii) On December 28, 1975 the 4th defendant executed a charge over the second portion of the estate in favour of OCF without the authority of the plaintiff company. The execution of that charge was a breach of trust by the 4th defendant – see paragraph 10 of the re-amended statement of claim – bundle B1 page 3.
- (iii) On August 14, 1976 the 4th defendant permitted OCF to enter upon and take possession of the second portion of the estate without the authority of the plaintiff company. His consent to the entry of OCF onto the land was a breach of trust. Paragraph 11 of the re-amended statement of claim.
- (iv) In September 1978 the 4th defendant executed a transfer of the second portion of the estate to OCF without the authority of the plaintiff company. The execution of that transfer was a breach of trust by the 4th defendant. Paragraph 13 of the re-amended statement of claim.

In considering the issue at A, I have held that the 4th defendant was a trustee to the plaintiff company in respect of this second portion of the estate.

In his evidence the 4th defendant admits he executed the charge of the trust property but contends that he did so on the instruction of Dawe. He also admits that he permitted the 1st defendant to enter into and remain in possession of the property, but again he contends that he had the authority of Dawe. He further contends that he transferred the property to Overseas Credit Finance on the instruction of Dawe.

The 4th defendant's main reliance was the letter from Amos J. Dawe at J-20 instructing Ng Kong Yeam to effect the transfer of the portion of the estate to the 4th defendant as his nominee. Because of this, his counsel reasons that it was the 4th defendant's understanding that he was holding the property in trust for Dawe and that he had to seek Dawe's authority for dealing with the land. To substantiate this, he further urges that this understanding is consistent with the understanding of

This understanding purportedly held by the 4th defendant requires closer scrutiny *vis-a-vis* his position as an advocate and solicitor.

- B The letter J-20 refers to the land to be transferred to him as "belonging to Lian Keow Sdn. Bhd." In the form effecting the transfer of the land J-22, the transferer is referred as Lian Keow Sdn. Bhd. and the transferee, the 4th defendant. Dawe was not a party to that transfer. From his evidence C (Notes of Evidence 482 and 483) it seems that the 4th defendant took the instruction from Dawe on the basis that Dawe was the beneficial owner of the property and not that on the basis that Dawe was acting on behalf of Lian Keow. This is clearly D contrary to the legal knowledge he is imputed to have on his standing as an advocate and solicitor in that as he had taken the transfer as a trustee, the legal estate still remained with Lian Keow whom he should be concerned with and should obtain proper authority from before executing the charge to Overseas Credit Finance, allowing the entry into E possession of the property by Overseas Credit Finance and finally transferring it to O.C.F.

- F Next, the 4th defendant's counsel referred to Choh Yet's evidence (Notes of Evidence – 225 to 231) and the evidence of Yap Fui Chong (Notes of Evidence – 541 to 542) who said to the effect that F everybody dealt with the property in accordance with Dawe's instructions. Referring to this he contends that 4th defendant's action was consistent with other officials of the plaintiff company. He concludes that these officers all danced to Dawe's bidding.

- G In my view, this is an unfortunate comparison and cannot be held to be a true reason for 4th defendant to entertain the understanding of the trust he held over the property. First, he was not an official of the plaintiff company as those others H were. Secondly as a member of a respected and independent profession of the Bar, he had no reason to do the bidding from Dawe if to his knowledge it was contrary to law and thirdly if the 4th defendant chose to dance to the tune of Dawe the piper (to follow the simile) in order to I be consistent with those others then, with his knowledge of music (the law) he must be dancing the Scottish reel to the tune of disco music. In other words, in my opinion, this contention of understanding held by the 4th defendant being consistent is a fallacy and I hold that the defendant was in breach of his trust.

(ii) *5th defendant*:- The claim against the 5th defendant, Yap Fui Chong, is founded essentially on breach of his fiduciary duty as a director of the plaintiff company – para. 9A of re-amended Statement of Claim at B1-3.

According to the evidence, Yap Fui Chong was the most aggrieved person in this proceeding. He was a major shareholder in Lian Keow Sdn. Bhd. and he practically owned 893 acres of the estate land in prime location in Johore Bahru. Beginning with a short memorandum of agreement (J-12) he entered with Amos Dawe on December 6, 1972 which agreement may not even be enforceable (see section 67 (1) Companies Act), he has lost the company and all his property. As Chairman and director of the company, he created the charge on the first portion to Overseas Credit Finance and transferred the 2nd and 3rd portion of the estate to Paramjothy & Wong Peng Fun. It is now alleged that he received no compensatory benefit for the company and as such acted detrimental to the interest of the plaintiff company. In those circumstances it is claimed that Yap was in breach of the duty he owed to the plaintiff company to act in its best interest. In support of that claim the plaintiffs' counsel referred to *Belmont Finance v. Williams Furniture (No. 2)*⁽¹²⁾ where it was stated that:

"... A limited company is of course not a trustee of its own funds; it is their beneficial owner; but in consequence of the fiduciary character of their duties, the directors of a limited company are treated as if they were trustees of those funds of the company which are in their hands or under their control, and if they mis-apply them they commit a breach of trust (*re Lands Allotment Co. v. Lindley & Kay L.J.J.*). So if the directors of a company in breach of their fiduciary duties mis-apply the funds of their company so that they come into the hands of some stranger to the trust who receives them with knowledge (actual or constructive) of the breach, he cannot conscientiously retain those funds against the company unless he has some better equity. He becomes a constructive trustee for the company of the mis-applied funds."

In my view, that case is of no assistance to this claim. On the facts of this case I have found in relation to issue F that the plaintiff company had acknowledged payments of the loan from Overseas Credit Finance as shown in its accounts for the financial year of June 30, 1973 (C1-130). In this account the 1st plaintiff treated the loan of \$3.3 million to Pan Orient as an asset of the plaintiff company. This sum of \$3.3 million represented the amount of the plaintiff company's indebtedness to Overseas Credit Finance which it received on-lent to Pan Orient.

A The fact that this loan, properly authorised by resolution, was made without security cannot, in my view, be attributed as breach of duty to the director of the company. It was, in my view, merely a bad judgment on the part of the director and may not be actionable in damages.

B For this reason though different from the 5th defendant's counsel's submission, I find that Yap is not liable under this head of the claim.

Validation Order:

C In view of my finding on section 223 of the Companies Act 1965 that the disposition by the plaintiff company of the estate to Overseas Credit Finance was void, the plaintiffs now seek for a validation order for the purpose of the said section. I deferred consideration of this subsidiary issue to the end of this proceeding in order to examine the evidence as a whole affecting the merits of this application.

E The principle in deciding this issue is as found by Vaisey J. in *Re Steane's (Bournemouth) Ltd.*⁽¹³⁾ that:-

F "But the view which I take of my duty under the section (shared, to the best of my relief, by Roxburgh J.) is that each case must be dealt with on its own facts and particular circumstances (special regard being had to the question of the good faith and honest intention of the persons concerned), and that the court is free to act according to the judge's opinion of what would be just and fair in each case."

G Vaisey J. there had to decide the effect of section 227 of the English Companies Act 1948 (equivalent to section 223 of our Act).

H The plaintiff's counsel contends that in considering this issue, the policy underlined in section 53 (1) of the Bankruptcy Act 1967 should apply. The policy stated there is to avoid disposition of the property by the parties at the time when the company was unable to pay its debt. The counsel referred to the decision of Oliver J. in *re Leslie Engineers Co. Ltd.*⁽¹⁴⁾ in support of his proposition. I do not accept that that was the policy discussed by Oliver J. in that judgment.

I In deciding the existence of good faith and honest intention in this matter, the absence of knowledge by the transferee of the winding up petition is a very powerful factor in favour of the Court exercising its jurisdiction to validate the transfer – see *Leslie Engineers Co. Ltd.* at 304 Oliver J.

In the present case Kay's evidence (Notes of Evidence – 274 C) is that he did not know about the winding up petition until January 26, 1979 and there is no other evidence to the contrary. In fact he is supported by Choh Yet's evidence (Notes of Evidence 2168) who said that he informed Kay of the winding-up petition after he saw the newspaper advertisement of the same date.

In these circumstances I find that the 1st defendant did not have knowledge of the winding up petition of the 1st plaintiff company when it took the transfers of the estate in November, 1978 and it is entitled to the validation order sought. There is no bad faith or dishonest intention proved against the 1st defendant.

My findings in these issues are:-

- A) The registered owners of the 2nd and 3rd portions of the estate held the properties upon trust for the 1st plaintiff at all material times before November 1978.
- B) The transfers of the 1st, 2nd and 3rd portions of the estate to the 1st defendant are:-
 - (i) not void by reason of section 53 of the Bankruptcy Act 1967;
 - (ii) void for the purpose of section 223 of the Companies Act 1965 but now validated.
- C) Section 53B of the Bankruptcy Act 1967 (as amended) does not apply to the proceeds of sale in view that the transfers were not avoided by reason of section 53 of the Act in the result that the 2nd plaintiff is not entitled to recover:-
 - a) from the first defendant the proceeds of the sale to the second defendant in March 1979;
 - b) from the 2nd defendant the proceeds of the sale to the third defendant in July 1979.
- D) It is not proved by the plaintiffs that equity ought to set aside the transfers of the 1st, 2nd and 3rd portion of the estate to the 1st defendant.
- E) This issue has been abandoned.
- F) The 1st plaintiff is still owing the 1st defendant the amount of monies adjudged in Originating Summons No. 83/1975 now secured on the proceeds of sale of the estate.

A G) The 1st plaintiff is entitled to recover damages:-

- (i) for breach of trust from the 4th defendant;
- (ii) not entitled to recover from the 5th defendant.

B

In the result, it is my judgment that all the claims against the 1st, 2nd and 5th defendants be dismissed with costs.

C There will be judgment for the plaintiffs as prayed against the 4th defendant and an order that damages against the 4th defendant be assessed with costs. Both costs to be taxed.

D Before leaving this case I wish to record my appreciation to all the counsel concerned especially to Mr. Chadwick and Mr. Rattee who have pleaded their cases before the Court clearly and argued them exhaustively. Their assistance in tracing relevant exhibits from the volumes of documents placed before the Court is commendable without which help the proceedings would have consumed more time.

E

Order accordingly.

Solicitors: *Skrine & Co., Adnan Sundra & Low; Ho Thian Cheh & Co.; Nijar & Nijar; Jackson & Masacorale.*

F

G KARPAL SINGH v. ATTORNEY-GENERAL, MALAYSIA

[O.C.J. (Mustapha Hussain J.) February 6, 1986]

[Alor Setar – Originating Summons No. 421 of 1984]

H *Criminal Law and Procedure – Cautioned Statement – Recording of – Whether before or after arrest – Criminal Procedure Code (F.M.S. Cap. 6), ss. 112 & 113(1)(a)(ii).*

I The Democratic Action Party organised a walkathon at Alor Setar. The plaintiff was a leader of the party. The walkathon was held on October 20, 1984 without a police permit. As a result the walkathon was broken up by the police. Some people were arrested but not the plaintiff. The plaintiff was later asked to make a cautioned statement under section 113 (1) (a) (ii) of the Criminal Procedure Code. The plaintiff refused and as he had no one to turn to he sought redress in the High Court by filing an originating summons seeking a declaration that the police could only record a cautioned statement from him under the provisions of section 113 (1) (a) (ii) of the Criminal